

BETWEEN:

ALLAN WERSTEIN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 28, 2022, at Windsor, Ontario.

Before: The Honourable Justice Joanna Hill

Appearances:

Counsel for the Appellant: Roland P. Schwalm

Counsel for the Respondent: Jason Stober

JUDGMENT

The appeal from the Notice of Assessment for the 2009 taxation year, dated November 14, 2011, is dismissed, with Tariff costs payable to the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of May 2023.

“Joanna Hill”

Hill J.

Citation: 2023 TCC 64
Date: 20230510
Docket: 2013-1185(IT)G

BETWEEN:

ALLAN WERSTEIN,

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and

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REASONS FOR JUDGMENT

Hill J.

I. Introduction

[1] Allan Werstein appealed the Minister of National Revenue's decision to impose a penalty for the false information contained in his 2009 income tax return. Like hundreds of taxpayers who used Fiscal Arbitrator tax preparers, Mr. Werstein claimed significant fictitious business losses to obtain refunds with respect to tax already withheld from his employment income in 2009 and in three previous taxation years.

[2] Although Mr. Werstein filed this appeal, the Respondent bears the burden of establishing that the Minister correctly assessed the penalty in the circumstances of his case.

[3] Applying the framework for Fiscal Arbitrator penalty appeals established by this Court in *Torres*,¹ I find that the Respondent has met that burden. Mr. Werstein was wilfully blind to the false statements in his income tax return. The determinative factors in this case are the blatantness of the false statements and the magnitude of the advantage in his return. Mr. Werstein ignored those warning signs in order to obtain a significant tax refund.

¹ *Torres v HMTQ*, 2013 TCC 380, (affirmed in *Strachan v HMTQ*, 2015 FCA 60), para 65.

II. Analysis

[4] Mr. Werstein does not deny that his 2009 income tax return contained false statements. As a result, the only question in this appeal is whether he made those false statements knowingly or in circumstances amounting to gross negligence, pursuant to subsection 163(2) of the *Income Tax Act*.²

[5] Counsel for the Appellant and the Respondent helpfully focused their submissions on what they considered the relevant factors under the *Torres* framework and the significant body of Fiscal Arbitrator penalty cases. I have adopted a similar approach to explain why Mr. Werstein's appeal cannot succeed.

A. Wilful blindness under the *Torres* framework

[6] Knowledge of a false statement can be imputed by wilful blindness. A taxpayer who does not want to know, or turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind.³ The knowledge requirement is satisfied when a taxpayer chooses not to make inquiries, in circumstances that suggest inquiries should be made.

[7] If Mr. Werstein ignored the warning signs identified in the *Torres* framework, the penalty will apply.

[8] Mr. Werstein testified at the hearing, primarily regarding the circumstances surrounding the filing of his 2009 income tax return.⁴ While he admitted his failings in this regard, his evidence was not always credible or reliable. He was unable to adequately explain why he filed his return notwithstanding the warnings signs evident in the blatant false statements and the unusually large tax refund claimed.

² At the hearing of the appeal, Mr. Werstein's counsel raised an additional argument that the Minister improperly calculated the penalty in s. 163(2) by utilizing the total fictitious loss of \$320,163.50, rather than the smaller loss claimed to offset his income in 2009. Mr. Werstein conceded this issue in light of the Respondent's submissions relying on authorities establishing that the formula includes losses available for use other taxation years, notwithstanding the greater financial consequences. (See for example, *Wardlaw v HMTQ*, 2019 TCC 199, paras 11-14.)

³ *Wynter v HMTQ*, 2017 FCA 195, paras 13 and 16.

⁴ The Respondent relied on the testimony and evidence of a Canada Revenue Agency officer, Janilee Sawatzky, who worked on the audit leading up to the penalty assessment. While she gave credible, reliable evidence, it was not relevant to the analysis under the *Torres* framework.

(i) education and experience

[9] I accept that Mr. Werstein's Grade 12 education, St. Clair College certificate in "Machine, Tools, Technology", and shift work employment at Ford Motor Company do not constitute significant financial education and experience.

[10] However, I do not accept his counsel's submission that this is where "the Minister's case comes to a halt." Mr. Werstein's education and experience were not so limited that he could ignore significant warning signs. This factor is not determinative and must be considered with the *Torres* framework as a whole.⁵

[11] Mr. Werstein had been employed with Ford Motor Company since 1983, earning over \$90,000 in 2009. He was in charge of the household finances for his family of four, renewed a mortgage with the Bank of Montreal every five years, and held RRSP investments with the same bank.

[12] The Fiscal Arbitrator program was not complex. It was not based on intricate series of transactions, obscure technical provisions of the *Income Tax Act*, or extensive financial statements and records. It was supported by a single document, a Statement of Business or Professional Activities, with limited information regarding Mr. Werstein's purported business activities.

[13] Mr. Werstein did not need extensive financial education or experience to recognize that claiming \$320,000 in business losses when he was not operating a business was blatantly false.

(ii) the blatantness of the false statements

[14] The false statements in this case were readily detectable.

[15] Mr. Werstein signed his income tax return, with attached Statement of Business or Professional Activities and Request for Loss Carryback forms, containing the following significant and blatant false statements:

(a) gross business income of \$116,746.30 from "RECEIPTS AS AGENT";

⁵ See *Manhue v HMTQ*, 2018 TCC 71, where this Court held that the education and experience bar is not overly high (para 32), and reviewed other cases applying this factor (paras 33-37).

(b) total business expenses of \$436,909.80 listed as “other expenses” from “AMT TO PRINCIPAL FR AGENT”;

(c) a net business loss of \$320,163.50; and

(d) a loss of \$221,225.96 as total income.

[16] Mr. Werstein testified that he saw “some big numbers” when he received his completed income tax return for signing. He asked his tax preparer, Bruce Blair, about them and was told that, “We’re the professionals. It’s been done professionally. Sign it and send it.” Mr. Werstein then signed his return.

[17] Mr. Werstein did not provide any details regarding the questions he asked Mr. Blair. Instead, he testified that he assumed that the big numbers related to an investment in a so-called Whitby land project (“Whitby Project”) made through the same tax preparers. However, there is no reference to the Whitby Project, or any type of land investment, in his income tax return.

[18] Although Mr. Werstein had never owned a business, he signed the income tax return and Request for Loss Carryback form claiming substantial business losses and making other false statements with respect to his income.

(iii) the magnitude of the advantage

[19] Based on these false statements, Mr. Werstein claimed a refund of \$25,981.85. That amount represented a complete refund of the taxes withheld from his employment income in 2009. Mr. Werstein knew this refund would be higher than what he usually received, since his refunds in previous years when he filed his income tax returns with H&R Block were not more than a few thousand dollars.

(iv) incomprehensible explanations by the tax preparer

[20] Before he signed and filed his income tax return, Mr. Werstein signed a series of documents with his tax preparers on November 23, 2009. One document, an “Application and Agreement (Alternative Tax Filing Education Information)”

related specifically to the Fiscal Arbitrators program. No details regarding the program were included.

[21] Mr. Werstein stated that he did not understand most of the documents he signed and that he would have discussed them with Bruce Blair. However, he did not recall those discussions, or whether he understood Bruce Blair's explanations. He stated that, "Many times I left there confused because of his, I wouldn't say doubletalk, but the way he described things."

[22] Mr. Werstein said he assumed that the documents he signed related to the Whitby Project. However, Mr. Werstein's evidence in this regard was unreliable because he was unable to provide details or supporting documents for this purported investment.

[23] Mr. Werstein's evidence regarding the false statements in his 2009 income tax return was similarly unreliable, as well as lacking credibility. His assertions that he relied on professionals are not sufficient in the circumstances, especially considering that he made no effort to ensure that he was in fact dealing with professionals.

[24] Mr. Werstein was introduced to Bruce Blair by a colleague at Ford Motor Company. He did not determine whether Bruce Blair had experience in investments or tax preparation. Mr. Werstein relied on a verbal recommendation, and the outward trappings of a "very professional, very legitimate looking business" with a secretary and "plaques on the wall with certificates".

(v) prior knowledge of the tax preparer

[25] With respect this *Torres* factor, both parties relied on the fact that Mr. Werstein previously used Bruce Blair to prepare his 2008 income tax return in support of their positions.

[26] In 2008, Mr. Werstein claimed a tax credit based on \$35,000 in charitable donation tax receipts issued under a gifting arrangement that only required him to make a \$5,000 cash payment. The Minister disallowed the entire claim, but reversed the decision in part, the month before Mr. Werstein filed his 2009 income tax return.

[27] Mr. Werstein's counsel submitted that Mr. Werstein was therefore entitled to unquestioningly rely on the 2009 Fiscal Arbitrator return because he had just received a refund based on the 2008 program promoted by Bruce Blair.

[28] The Respondent submitted that this 2008 filing history constitutes additional warning signs that Bruce Blair had improper practices. The Minister reversed her position regarding the claimed credit based on representations from Bruce Blair that a \$30,000 tax receipt had been issued by another registered charity. However, Mr. Werstein admitted he did not receive a tax receipt from that organization.⁶

[29] I am not persuaded by either party's position. The 2008 income tax return was not prepared by Fiscal Arbitrators and involved a separate claim supported, at least superficially, by two donation receipts totalling \$35,000.

[30] By contrast, Mr. Werstein reported a fictitious business loss of almost ten times that amount in 2009. The \$320,163.50 net business loss was not supported by any documentation. There was no basis for Mr. Werstein to simply accept the "big numbers" and sign the return. To the extent that the circumstances surrounding the 2008 filing is relevant, it supports the imposition of the penalty, but not in the way proposed by the Respondent.

(vi) failure to make inquiries with third parties

[31] The warning signs were significant enough that Mr. Werstein's failure to make inquiries with a third party also establishes wilful blindness. Despite the big numbers and his overall confusion, Mr. Werstein did not consult with his previous tax preparers at H&R Block, the Canada Revenue Agency, his friends, or his family.

III. Conclusion

[32] To promote taxpayer honesty in Canada's self-assessing tax system, subsection 163(2) permits the Minister to impose a penalty on a taxpayer who knowingly, or under circumstances amounting to gross negligence, makes a false statement in filing an income tax return.

⁶ Mr. Werstein received two tax receipts from Greater Works Ministries of Canada, but Bruce Blair made representations to the Minister on Mr. Werstein's behalf that the second receipt for \$30,000 was issued by Furry World's Rescue Mission.

[33] Mr. Werstein is liable for this penalty because he should have known better. He chose to ignore the obvious false statements in his income tax return in order to obtain substantial refunds of taxes withheld from his employment income.

[34] The appeal is therefore dismissed, with costs to the Respondent in accordance with the Tariff.

Signed at Ottawa, Canada, this 10th day of May 2023.

“Joanna Hill”

Hill J.

CITATION: 2023 TCC 64

COURT FILE NO.: 2013-1185(IT)G

STYLE OF CAUSE: ALLAN WERSTEIN V. HIS MAJESTY
THE KING

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: November 28, 2022

REASONS FOR JUDGMENT BY: The Honourable Justice Joanna Hill

DATE OF JUDGMENT: May 10, 2023

APPEARANCES:

Counsel for the Appellant: Roland P. Schwalm

Counsel for the Respondent: Jason Stober

COUNSEL OF RECORD:

For the Appellant:

Name: Roland P. Schwalm

Firm: Roland P. Schwalm Barrister & Solicitor

For the Respondent: Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada